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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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with respect to all matters pertaining to class certification,

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QUESTIONS PRESENTED

1. Does an order entered by a federal district court certifying a mandatory class action under Fed. R. Civ. P. 23(b)(1) enjoin potential or pending state court suits and thus qualify as an injunction appealable immediately under 28 U.S.C. § 1292(a)(1)?

2. Does the Anti-Injunction Act, 28 U.S.C. § 2283, take away a federal district court's power to certify a mandatory class action once a member of the class has filed an individual suit in state court, even if a class action is necessary to ensure fairness among all class members?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover and all other class members similarly situated *†; The Honorable Scott D. Wright, United States District Court Judge for the Western District of Missouri †; Jacqueline N. Rau *; Melanie Hanson Johnson, Gerard Stanley Johnson, and other state court plaintiffs similarly situated.†

Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and Hyatt Hotels Corp., and the Plaintiffs' Liaison Committee participated as *amici curiae*.

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* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

† Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Shirley Stover, the representative plaintiff, and the class of all business invitees present at the Kansas City Hyatt Regency Hotel disaster on July 17, 1981 pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 7, 1982.

OPINIONS BELOW

The opinion of a panel (2-1) of the Court of Appeals for the Eighth Circuit, vacating the District Court's certification order, is reproduced as Appendix A. The opinion of the United States District Court for the Western District of Missouri granting class certification is reported at 93 F.R.D. 415; the opinion and accompanying order are reproduced as Appendix D.

JURISDICTION

The judgment of the Eighth Circuit was entered June 7, 1982. Rehearing *en banc* was denied 3-3, one judge abstaining, on July 9, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 1292(a)(1) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

2. 28 U.S.C. § 2283 provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

3. Federal Rule of Civil Procedure 23, respecting class actions, is reproduced in its entirety as Appendix E.

STATEMENT

On Friday, July 17, 1981, during the weekly tea dance at the Hyatt Regency Hotel in Kansas City, Missouri, two skywalks suddenly collapsed, killing 114 persons and injuring hundreds more. On the next business day, Monday, July 20, 1981, three suits were filed against various parties responsible for the design and construction of the

skywalks.[1] Two of these suits were filed in Missouri state court. The following day, two additional suits were filed.[2] Within six months of the disaster, approximately 150 suits had been filed in Missouri state court and the United States District Court for the Western District of Missouri, seeking over $1 billion in compensatory damages and $500 million in punitive damages. Several defendants asserted in their answers that multiple punitive awards based on the same conduct would violate Missouri law and the constitutional guarantee of due process.[3]

On September 1, 1981, one of the victims, Molly Riley, filed a complaint in the Western District of Missouri and requested that the court certify a Rule 23 class consisting of the 1500 to 2000 business invitees present in the lobby of the hotel when the skywalks collapsed. Jurisdiction was asserted on the basis of diversity, 28 U.S.C. 1332. A month later, defendant Hyatt Corporation asserted that "the damages sought in the lawsuits which have already been filed far exceed the total amount of insurance coverage available under all the insurance policies issued by all of defendants."[4] The defendants' responses to interrogatories also showed that the net worth of several contractors respon-

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[1] *Moberg, et al.* v. *Crown Center Redevelopment Corp.* et al., No. 81-0593-CV-W-3 (W.D.Mo.); *Savage et al* v. *Crown Center Redevelopment Corp. et al.*, No. CV81-15245 (C.Ct. Jackson Cty., Mo.); *Willia[illegible]* v. *Crown Center Redevelopment Corp.* et al., No. CV81-15244 (C. Ct. Jackson Cty., Mo.).

[2] *Alcala* v. *Crown Center Redevelopment Corp. et al.*, No. 81-0606-CV W-4 (W.D. Mo.); *Rhodes* v. *Crown Center Redevelopment Corp. et al* No. CV81-15310 (C.Ct. Jackson Cty., Mo.).

[3] *See, e.g.*, Answers of Hallmark Cards, Inc. and Crown Center Redevelopment Corp., October 8, 1981.

[4] Petition for Declaratory Judgment and Incidental Relief, *Hyatt Corp.* v. *Occidental Fire & Casualty Co. of North Carolina et al.*, No. CV81-22009 (C.Ct. Jackson Cty, Mo., Oct. 2, 1981), at 9.

sible for building the skywalks was minimal or negative.[5] The risk of insufficient funds to pay compensatory damage judgments and any funds at all for punitive damages became apparent.

On January 25, 1982, the District Court certified a mandatory class action under Rule 23(b)(1) on three issues: (1) compensatory liability, (2) punitive liability; and (3) amount of punitive damages. The court held that a classwide adjudication of punitive damages was necessary because the defendants' assets might be insufficient to satisfy all claims and because there is "uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages." (A. 53a)[6] Absent a class action, early-suing plaintiffs might well exhaust the defendants' assets or obtain punitive damage awards that would preclude or cut back such awards in subsequent suits. As to liability for compensatory damages, the court held that a class action was appropriate to avoid "wasteful repetitive litigation" and inconsistent results. (A. 49a-50a)[7] Shirley Stover, whose husband had died in the collapse and who had suffered serious personal injuries, was selected as the class representative.

The court ruled that the compensatory damages recoverable by each class member would be determined individually and not in the class action. Although the class action was certified under Rule 23(b)(1), which does

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[5] For example, Gillum-Colaco, the structural engineer responsible for the skywalks, reported a negative net worth.

[6] References cited as "A." refer to the pages of the Appendices bound with this Petition.

[7] The court also emphasized that failure to certify a class action would leave those attorneys who represent more than one victim with a conflict of interest. (A. 54a) Those attorneys, of whom there are several, would be "forced to decide which case to proceed with first" in the context of both a potentially limited fund and the negative effect that a punitive damage verdict obtained for one client would have in a subsequent trial on behalf of another client. *Id.*

not permit class members to opt out of the class, the court provided that class members could "settle their respective claims against any or all defendants" on an individual basis. (A. 41a) [8]

The District Court did not enjoin class members from pursuing individual suits in either state or federal court.[9] Accordingly, on February 2, 1982, certain plaintiffs who had opposed class certification filed a motion to proceed in state court notwithstanding the class action. Subsequently, however, these plaintiffs indicated to the state court that they "did not want that motion set down for a hearing . . ., but wanted the matter deferred." [10]

Indeed, in this case, the state court proceedings halted, not as a result of federal compulsion, but rather because the plaintiffs whose suits were pending in state court informed the judge presiding over the suits that they wanted the matter deferred pending a ruling by the Eighth Circuit. Shortly before the panel's decision, those plaintiffs changed their mind and requested permission to proceed. They explicitly recognized that the state court "ha[d] not been enjoined, [that] these proceedings have not been stayed . . . ." Transcript of Proceedings, *In re Skywalk Cases*, No. CV81-15244 MCF, Civ. Docket I (C. Ct. Jackson Cty., Mo., June 1, 1982), at 22. On June 3, 1982, four days before the panel's decision, the request to proceed was granted by the state court.

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[8] *See also*, A. 47a (class members' "interest in settling their claims . . . is not restricted by this order").

[9] Prior to the certification of the class, the District Court had indicated that it would not be necessary to enjoin the state proceedings:

> "Well, I don't think that's going to be a problem because I don't think that's even going to come up." Transcript of Dec. 10, 1981, Hearing Before the Honorable Scott O. Wright at 76.

[10] The quotation is from a state court order of June 3, 1982 (p. 1), which noted that the last pleading on this subject was filed on February 24, 1982.

On February 8, 1982, class members Melanie Stanley Johnson and Gerard Stanley Johnson filed a petition for a writ of mandamus in the Court of Appeals for the Eighth Circuit, seeking to set aside the class action and to compel the District Court to disqualify itself.[11] On February 9, 1982, class member Jacqueline N. Rau filed an interlocutory appeal and, in the alternative, a petition for mandamus, requesting the same relief. The cases were consolidated by the Eighth Circuit. Petitioners here, the representative plaintiff and the class, opposed the petitions and the appeal.

The federal panel rendered its decision on June 7, 1982. (A. 1a) The panel held (2-1) that the class certification order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1) and barred by the Anti-Injunction Act. (A. 2a-16a) Without questioning the need for a class action, the majority ruled that the Anti-Injunction Act bars mandatory class actions unless they are certified before any class member files an individual suit in state court. *Id.*

Judge Heaney dissented. In a 22-page opinion, he emphasized that "the approach adopted by the majority . . . broadly forecloses mandatory class actions whenever a class member has commenced state court proceedings." (A. 37a) He disagreed squarely with the majority's view of the Anti-Injunction Act. Relying upon the exception for injunctions "necessary in aid of" jurisdiction, Judge Heaney remarked that "it seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class" and therefore proper. (A. 34a) Judge Heaney also pointed out that "there are unusually strong reasons for certifying the mandatory class here," and that "no plaintiff has, as yet, been enjoined from pursuing any state court action." (A. 34a).

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[11] The grounds asserted in support of disqualification are not pertinent to this petition. The panel unanimously agreed that there was no basis for disqualification. (A. 16a-17a)

On July 9, 1982, by an equally divided vote (3-3), the Eighth Circuit denied petitioners' petitions for rehearing and rehearing *en banc*.[12] (A. 38a)

REASONS FOR GRANTING THE WRIT

This case presents issues that will have a significant impact on two important areas of federal procedure.

First: *Interlocutory Appellate Review.* The effect of the Eighth Circuit's opinion is to render virtually all orders certifying mandatory class actions subject to interlocutory appeal as of right by any class member on the theory that they constitute implicit injunctions. If allowed to stand, this unprecedented ruling would create a new exception to the final judgment rule and would severely undermine the long-standing policy against piecemeal appellate review.

Second: *Mandatory Class Actions.* The panel decision eviscerates mandatory class actions in the federal courts. The Eighth Circuit's decision holds that federal court cannot certify a mandatory class action once a class member has filed an individual suit in state court, regardless of the inequity that would result from individual suits. If allowed to stand, the majority's novel ruling would, for all practical purposes, eliminate federal mandatory class actions by permitting one individual, simply by arriving at a state courthouse first, to deprive a federal court of the power to entertain a mandatory class action.

I. ORDERS CERTIFYING MANDATORY CLASS ACTIONS DO NOT CONSTITUTE INJUNCTIONS AND ARE NOT APPEALABLE AS OF RIGHT.

Review by this Court is appropriate to examine the panel's unprecedented holding that the certification of a mandatory class action, standing alone, constitutes an in-

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[12] Chief Judge Lay, Judge Heaney and Judge Bright voted to grant rehearing *en banc*. Judge John R. Gibson did not participate in the consideration of the petition.

junction and is therefore appealable as of right under 28 U.S.C. § 1292(a)(1).

No injunction issued here. "[N]o plaintiff has, as yet, been enjoined from pursuing any state court action." (A. 34a) (Heaney, J., dissenting) And nothing in Rule 23 states that certification of a mandatory class action constitutes an injunction. The Rule provides only that the judgment in such a class action will include all class members. *See* Fed. R. Civ. P. 23(c)(3). As Wright & Miller opine, this does not necessarily mean that it will bind all the persons named as class members. *See*, 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1789 at 176 (1972). A class member is free to pursue a separate suit in state court, notwithstanding the class certification, assuming that neither the state court nor the federal court were to interfere by a *subsequent* stay of the state proceedings. *See In re Glen W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

Certification simply does not constitute an order prohibiting the class member from proceeding with his own action. The priority between a state court judgment and any judgment entered in the federal class action would be determined by the doctrine of *res judicata*.

Obviously, once a mandatory class action has been certified, it may make little sense for class members to proceed with individual suits, or for the courts in which those suits are pending to permit them to do so. But that does not mean that the initial certification of a class action constitutes an injunction.

We are not aware of any case, and the panel decision cites none, in which certification of a mandatory class action has been treated as an injunction appealable as of right under 28 U.S.C. § 1292(a)(1). Furthermore, the panel's decision is inconsistent with the reasoning of two recent and unanimous Supreme Court decisions. In *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978), this Court emphasized that § 1292(a)(1)

"does not embrace orders that have no direct or irreparable impact on the merits of the controversy." An order certifying a class action has no irreparable consequences and is therefore outside the ambit of § 1292(a)(1). As this Court stated in a case decided the same day as *Gardner*, "a district court's order denying or granting class status is inherently tentative." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n.11 (1978).[13] Such a preliminary procedural determination cannot be regarded as the grant or denial of an injunction. While the District Court's order "may have a significant effect on the litigation, '[m]any interlocutory orders are equally important, . . . but they are not for that reason converted into injunctions.'" *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. at 481 (citation omitted).

To assert jurisdiction by labeling a class certification an injunction is to circumvent "the congressional policy against piecemeal appeals." *Switzerland Cheese Assn., Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). As this Court has stated:

> "Moreover, allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final judgment rule—'that of maintaining the appropriate relationship between the respective courts . . . .' This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving." *Coopers & Lybrand*, 437 U.S. at 476.

Indeed, the interpretation set forth by the panel would apply whether there was a pending or potential individual suit in state *or* federal court; either would be "enjoined" from proceeding once a mandatory class had been certified. It would also apply equally to a *denial*

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[13] "By the very language of the rule, any order rendered by the district court regarding the maintenance of the class action may be considered conditional, and may be altered or amended before any decision on the merits.' Fed. R. Civ. P. 23(c)(1)." *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975).

of a mandatory class action. The denial would be considered the refusal of an injunction and thus directly appealable on an interlocutory basis. This, of course, is contrary to this Court's holding in *Coopers & Lybrand*, *supra*.

Given the strict limitations that this Court has imposed on interlocutory appeals under 28 U.S.C. § 1292(a)(1), the panel's ruling that an order certifying a mandatory class action constitutes an appealable injunction is an unwarranted expansion of appellate jurisdiction.

II. THE PENDENCY OF AN INDIVIDUAL SUIT IN STATE COURT CANNOT STRIP A FEDERAL COURT OF THE POWER TO TRY A MANDATORY CLASS ACTION.

A. The Panel's Decision Eviscerates Federal Rule of Civil Procedure 23.

The panel's decision adopts "a rule which broadly defeats the purpose of mandatory class action jurisdiction." (A. 37a) (Heaney, J., dissenting). The decision holds that by virtue of the Anti-Injunction Act, 28 U.S.C. § 2283, the filing of an individual suit in state court deprives a federal court of the power to try a mandatory class action. A single member of the class can prevent a mandatory class action simply by commencing a state proceeding first.

As a practical matter, this decision will drastically restrict the power of the federal courts to certify any of the mandatory class actions authorized by Rule 23, except in the relatively rare case where exclusive jurisdiction vests in the federal court.[14] It is highly unlikely that a federal

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[14] Fed. R. Civ. P. 23 authorizes class actions in three situations. First, where individual suits would prejudice the interests of the members of the class, Rule 23(b)(1)(B), or the interests of the party opposing the class, Rule 23(b)(1)(A). Second, where the party opposing the class has acted or refused to act on grounds generally applicable to the class. Rule 23(b)(2). Third, where questions of law or fact common to the class predominate over individual

court could, with respect to class certification, permit appropriate discovery, receive any briefs interested parties may file, hold a hearing on the matter, and certify a class action, all before a single member of the class files a complaint in state court. In this case, it would have been truly impossible to certify a mandatory class action, since the first state court action was filed on the first business day after the hotel disaster. Indeed, it was the very existence of many individual actions, both state and federal, which enabled the court to determine that a class action was needed to protect the interests of all injured persons and to insure that no one person's recovery affected or precluded another's.

There can be no more compelling case for a mandatory class action than the situation in which tortfeasors lack sufficient funds to satisfy all the claims of the victims. Without a class action, recovery for wrongs done may be determined not by the merits of claims, but by "an unseemly race to the courtroom door with monetary prizes for [the] winners and worthless judgments for the rest." *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977), *petition for mandamus denied*, 588 F.2d 543, 544 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979).

The framers of Rule 23 foresaw the need for a procedural device to prevent so inequitable a result. Rule 23(b)(1)(B) provides that a federal court may certify a mandatory class action if individual suits would threaten the interests of the members of the class. The Advisory Committee that drafted the Rule recognized that this would "plainly [be] the case when claims are made

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questions and a class action would be the best means of adjudicating the controversy. Rule 23(b)(3).

Class members are not permitted to opt out of the class in the first two situations, for the fundamental reason that a unitary adjudication is essential to achieve the purposes of the class action. Rule 23(c)(3). Class members are allowed to opt out a Rule 23(b)(3) class action because by doing so they do not frustrate the class action. Rule 23(c)(2).

The panel's decision bars certification of either of the first two types of class actions once a class member files suit in state court.

by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee's Note to Federal Rule of Civil Procedure 23, 39 F.R.D. 98, 101 (1966).[15]

Here, the panel set aside a class certification even though it in no way questioned the District Court's conclusion that such a proceeding was needed to prevent "the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party," (A. 58a) The majority noted the District Court's concern for the efficient management of mass tort litigation and commended "his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster." (A. 18a) Judge Heaney, in his dissent, echoed similar praise.

> "In sum, the district court's class action satisfies all the requirements of Rule 23, and the state and fed-

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[15] The district court in the "Dalkon Shield" litigation, for just such reasons, certified a nationwide class on punitive damages and a statewide (California) class on liability for compensatory damages. *In Re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 521 F. Supp. 1188 (N.D. Cal. 1981). The certification was vacated by the United States Court of Appeals for the Ninth Circuit on June 18, 1982. Nos. 81-4648 et al., slip op. (9th Cir., June 18, 1982). None of the reasons for the reversal are applicable to the Hyatt Hotel disaster litigation. The Ninth Circuit held that: (1) no testimony was taken to determine the existence of a limited fund available to pay damage awards. Here discovery was taken. The court held a hearing where it received this information plus additional data. (2) The punitive damage standards of fifty different jurisdictions were applicable. There, only the standard in Missouri applies. (3) There was no representative plaintiff and no one ever sought the role. Not true here. Molly Riley moved for certification and Shirley Stover was named the representative plaintiff. (4) The designated lead counsel resigned and the availability of adequate lead counsel remained an open question. Experienced lead counsel are handling this case. (5) The conduct of the defendant differed in time, quality and quantity with regard to each class member. All class members here suffered as a result of a common disaster, on one date, whose cause is identical for every claimant. (6) There were discrete affirmative defenses which may or may not have applied to the class members. Here, none exist with respect to the Hyatt Hotel disaster.

> eral constitutions. Moreover, certification of a class action would promote judicial economy in a complex case where such concerns are especially significant. It would protect the interests of defendants by avoiding relitigation and inconsistent determinations of their relative liability. And it would protect the plaintiffs by ensuring prompt determination of liability (thereby promoting settlements) and by guaranteeing that any punitive damage award would be fairly allocated to all plaintiffs. (A. 82a)

In short, in the face of a need, recognized by all, for a class action, the panel's majority allowed a mandatory class action to be defeated by the very race to the courthouse the rule was designed to prevent. As the dissent noted, this is "simply the wrong rule in light of the necessary dictates of mandatory class actions." (A. 33a)

B. The Certification of a Mandatory Class Action To Protect a Limited Fund Is Necessary in Aid of The Federal Court's Jurisdiction.

The panel's decision is not supported by the Anti-Injunction Act or by "any sensible view of the relations between state and federal courts." (A. 37a) (Heaney, J., dissenting).

Although the Anti-Injunction Act generally bars injunctions against state court proceedings, it exempts from its ambit injunctions issued by a court "where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283. This Court has recognized that a federal court may enjoin state proceedings where essential to permit it "[t]o exercise its jurisdiction freely and fully," *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501, 506 (1954), or where "necessary to prevent a state court from so interfering with [its] consideration or disposition of a case as to seriously impair [its] flexibility and authority to decide that case." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970).

Trying all claims in one proceeding is no less necessary in a mandatory class action under Rule 23 than in inter-

pleader under Federal Rule of Civil Procedure 22. In that latter situation, it is well established that an injunction may issue to bar the claimants from proceeding with pending state suits. *See, e.g., United States* v. *Major Oil Corp.*, 583 F.2d 1152, 1158 (10th Cir. 1978); *Pan American Fire & Casualty Co.* v. *Revere*, 188 F. Supp. 474, 485 (E.D. La. 1960) ("If the court had no power to enjoin concurrent state court proceedings, the grant of interpleader would often create more problems than it solved."); *Jefferson Standard Life Insurance Co.* v. *Smith*, 161 F.Supp. 679, 681 (E.D.S.C. 1956). *See also Texas* v. *Florida*, 306 U.S. 398, 412 (1939). Although Congress has expressly authorized injunctions only in statutory interpleader actions under 28 U.S.C. § 1335, *see* 28 U.S.C. § 2361, the courts have not deemed this critical and have issued injunctions in Rule 22 interpleader actions as well.

Just as Rule 22 interpleader lies where a stakeholder "is or may be exposed to double or multiple liability," a mandatory class action will be certified where claimants are or may be faced with a limited fund. And just as Rule 22 interpleader protects a stakeholder from the threat of multiple claims in numerous individual suits, a Rule 23(b)(1) class action protects claimants from the risk that the defendants' assets will be exhausted by numerous individual suits. Claimants such as the victims of the Hyatt disaster are no less in need of protection than a stakeholder, and a federal court can have no less power to provide them the protection they need.

If the class certification here constituted an injunction—which it did not—such an injunction was "absolutely necessary to the district court's jurisdiction." (A. 35a) (Heaney, J., dissenting). To hold otherwise would be to eliminate mandatory class actions in all instances save one—where the class action is exclusively federal. If this is all that is left of Rule 23, this Court, and not a single, deeply divided court of appeals, should say so.

CONCLUSION

Class counsel have engaged in extensive discovery for over eight months. Dozens of depositions have been taken. Thousands and thousands of documents have been read, analyzed, and indexed. The discovery continues while this Petition is pending. Trial on all class issues is close at hand. Accordingly, the petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit.

Respectfully submitted,

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